

REMARKS

Claims 1-33 are pending in the Application. Claim 1-33 are rejected under 35 U.S.C. §103. Claims 1, 10, 19 and 28 were cancelled without prejudice or disclaimer. Applicants reserve the right to file a continuation application to capture the subject matter of originally filed claims 1, 10, 19 and 28. Hence, claims 2-9, 11-18, 20-27 and 29-33 are pending. Applicants respectfully traverse these rejections for at least the reasons stated below and respectfully request the Examiner to reconsider and withdraw these rejections.

Applicants thank the Examiner for discussing the Office Action with Applicants' attorney on March 26, 2004.

Applicants note that claims 4, 13, 22 and 32 were not amended to overcome prior art but to be written in independent form. Applicants further note that claims 2, 5, 11, 14, 20, 23 and 29-31 were not amended to overcome prior art but to provide consistency with the cancellation of claims 1, 10, 19 and 28. Hence, the amendments made to claims 2, 4-5, 11, 13-14, 20, 22-23, 29-32 were not narrowing in scope and therefore no prosecution history estoppel arises from the amendments to claims 2, 4-5, 11, 13-14, 20, 22-23, 29-32. *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 62 U.S.P.Q.2d 1705, 1711-12 (2002); 56 U.S.P.Q.2d 1865, 1870 (Fed. Cir. 2000). Further, the amendments made to claims 2, 4-5, 11, 13-14, 20, 22-23, 29-32 were not made for a substantial reason related to patentability and therefore no prosecution history estoppel arises from such amendments. *See Festo Corp.*, 62 U.S.P.Q.2d 1705 at 1707 (2002); *Warner-Jenkinson Co. v. Hilton Davis Chemical Co.*, 41 U.S.P.Q.2d 1865, 1873 (1997).

Applicants note that claims 1, 10, 19 and 28 were not cancelled in response to the Examiner's rejection as the Examiner did not submit objective evidence for combining Miller et al. (U.S. Patent No. 5,920,701) and Phaal (U.S. Patent No. 6,055,564) to establish a *prima facie* case of obviousness. Instead, claims 1, 10, 19 and 28 were cancelled to further prosecution. The Examiner must subject objective evidence and not rely on his own subjective opinion for modifying Miller et al. to resend a network request to a server by a client. *In re Lee*, 61 U.S.P.Q.2d 1430, 1434

(Fed. Cir. 2002). There is no language in Miller et al. suggesting to resend a network request. Further, the Examiner must submit objective evidence and not rely on his own subjective opinion for combining Miller et al., which teaches transmission of data from a content source over a network to a replicated server according to a schedule, with Phaal, which teaches admission control with multiple classes of service and priority processing. There is no suggestion in Miller et al. of admission control. Since the Examiner has not submitted objective evidence for modifying Miller et al. to resend a network request or modifying Miller et al. to have admission control with multiple classes of service and priority processing, the Examiner has not presented a *prima facie* case of obviousness for rejecting claims 1-30 including cancelled claims 1, 10, 19 and 28. *Id.*

I. REJECTIONS UNDER 35 U.S.C. §103(a):

The Examiner has rejected claims 1-33 under 35 U.S.C. §103(a) as being unpatentable over Miller et al. (U.S. Patent No. 5,920,701) (hereinafter "Miller") in view of Phaal (U.S. Patent No. 6,006,269). Applications respectfully traverse these rejections for at least the reasons stated below and respectfully request the Examiner to reconsider and withdraw these rejections.

A. Miller and Phaal, taken singly or in combination, do not teach or suggest the following claim limitations.

Applicants respectfully assert that Miller and Phaal, taken singly or in combination, do not teach or suggest "breaking a file requested in said network request into a set of subfiles, wherein said network request scheduled for resending comprises a request to send a preselected subfile of said set of subfiles" as recited in claim 4 and similarly in claims 13, 22 and 32. The Examiner cites column 5, lines 19-23 of Miller as teaching the above-cited claim limitation. Paper No. 11, page 3. Applicants respectfully traverse and assert that Miller instead teaches that the data transmitted from the content sources, content sources 12, 14, typically takes the form of a plurality of data frames or data packets which together constitute a computer file.

(There is no language in the cited passage of breaking a file into subfiles. Further, there is no language in the cited passage of a request to send a preselected subfile.)

Therefore, the Examiner has not presented a *prima facie* case of obviousness since the

Examiner is relying upon an incorrect, factual predicate in support of the rejection. *In re Rouffet*, 47 U.S.P.Q.2d 1453, 1455 (Fed. Cir. 1998).

Applicants further assert that Miller and Phaal, taken singly or in combination, do not teach or suggest "selecting said scheduled time comprises the step of selecting said scheduled time from a preselected plurality of time slots, wherein each time slot includes a first portion having a first preselected proportion of a predetermined network resource capacity, said first portion comprising a portion reserved for servicing requests in real time, and wherein said first portion includes a second portion reserved for servicing requests having a first priority" as recited in claim 8 and similarly in claims 17 and 26. The Examiner cites column 5, lines 35-40; column 9, lines 17-28; column 13, lines 28-34 and column 14, lines 46-49 of Phaal as teaching the above-cited claim limitation. Paper No. 11, page 4. Applicants respectfully traverse and assert that Phaal instead teaches that a deferral manager can determine a time for admission based on the use of reserved time slots, which are allocated on a first-come, first-served basis; optionally, a client can be afforded a choice of these slots, to pick a time convenient for the client's user. Column 2, lines 59-64. Phaal further teaches that reserved time slots are "held open," e.g., the set of parameters that are used to define maximum desired processing load are made to be dynamic, so as to limit processing of contention messages (that is to say, sessions not having a reserved time slot) when the server is awaiting sessions having a reserved time slot. Column 13, lines 29-35. Phaal further teaches that it may be desirable to limit acceptance of new, contention messages, if the admission control gateway is expecting a large number of new sessions having appointments. Column 14, lines 46-49.

While Phaal teaches that a client can pick a time from these reserved time slots, there is no language in Phaal teaching that a reserved time slot has a preselected proportion of a network resource capacity. Further, there is no language in Phaal teaching that a reserved time slot includes a portion reserved for servicing requests in real time. Further, there is no language in Phaal teaching that a reserved time slot includes a portion reserved for servicing requests having a first priority. Phaal does teach two classes of services, namely for priority messages and messages not having

priority status. Column 9, lines 17-25. However, there is no language in Phaal that a reserved time slot includes a portion reserved for servicing requests having a priority. Therefore, the Examiner has not presented a *prima facie* case of obviousness since the Examiner is relying upon an incorrect, factual predicate in support of the rejection. *In re Rouffet*, 47 U.S.P.Q.2d 1453, 1455 (Fed. Cir. 1998).

Applicants further assert that Miller and Phaal, taken singly or in combination, do not teach or suggest "selecting said scheduled time comprises the step of selecting said scheduled time from a preselected plurality of time slots, wherein each time slot includes a first portion having a first preselected proportion of a predetermined network resource capacity, said first portion comprising a portion reserved for servicing at least one scheduled request, and wherein said first portion includes a second portion reserved for servicing requests having a first priority" as recited in claim 9 and similarly in claims 18 and 27. The Examiner cites column 5, lines 35-40; column 9, lines 17-28; column 13, lines 28-34 and column 14, lines 46-49 of Phaal as teaching the above-cited claim limitation. Paper No. 11, page 4. Applicants respectfully traverse and assert that Phaal instead teaches that a deferral manager can determine a time for admission based on the use of reserved time slots, which are allocated on a first-come, first-served basis; optionally, a client can be afforded a choice of these slots, to pick a time convenient for the client's user. Column 2, lines 59-64. Phaal further teaches that reserved time slots are "held open," e.g., the set of parameters that are used to define maximum desired processing load are made to be dynamic, so as to limit processing of contention messages (that is to say, sessions not having a reserved time slot) when the server is awaiting sessions having a reserved time slot. Column 13, lines 29-35. Phaal further teaches that it may be desirable to limit acceptance of new, contention messages, if the admission control gateway is expecting a large number of new sessions having appointments. Column 14, lines 46-49.

While Phaal teaches that a client can pick a time from these reserved time slots, there is no language in Phaal teaching that a reserved time slot has a preselected proportion of a network resource capacity. Further, there is no language in Phaal teaching that a reserved time slot includes a portion reserved for servicing requests

having a first priority. Phaal does teach two classes of services, namely for priority messages and messages not having priority status. Column 9, lines 17-25. However, there is no language in Phaal that a reserved time slot includes a portion reserved for servicing requests having a priority. Therefore, the Examiner has not presented a *prima facie* case of obviousness since the Examiner is relying upon an incorrect, factual predicate in support of the rejection. *In re Rouffet*, 47 U.S.P.Q.2d 1453, 1455 (Fed. Cir. 1998).

Applicants further assert that Miller and Phaal, taken singly or in combination, do not teach or suggest "wherein said scheduled time is selected from a preselected plurality of time slots, each time slot including a first portion having a first preselected proportion of a predetermined network resource capacity, said first portion comprising a portion reserved for servicing requests in real time, and each time slot including a second portion having a first preselected proportion of a predetermined network resource capacity, said second portion comprising a portion reserved for servicing at least one scheduled request" as recited in claim 33. The Examiner cites column 5, lines 35-40; column 9, lines 17-28; column 13, lines 28-34 and column 14, lines 46-49 of Phaal as teaching the above-cited claim limitation. Paper No. 11, page 4. Applicants respectfully traverse and assert that Phaal instead teaches that a deferral manager can determine a time for admission based on the use of reserved time slots, which are allocated on a first-come, first-served basis; optionally, a client can be afforded a choice of these slots, to pick a time convenient for the client's user. Column 2, lines 59-64. Phaal further teaches that reserved time slots are "held open," e.g., the set of parameters that are used to define maximum desired processing load are made to be dynamic, so as to limit processing of contention messages (that is to say, sessions not having a reserved time slot) when the server is awaiting sessions having a reserved time slot. Column 13, lines 29-35. Phaal further teaches that it may be desirable to limit acceptance of new, contention messages, if the admission control gateway is expecting a large number of new sessions having appointments. Column 14, lines 46-49.

While Phaal teaches that a client can pick a time from these reserved time slots, there is no language in Phaal teaching that a reserved time slot has a preselected

proportion of a network resource capacity. Further, there is no language in Phaal teaching that a reserved time slot includes a portion reserved for servicing requests in real time. Therefore, the Examiner has not presented a *prima facie* case of obviousness since the Examiner is relying upon an incorrect, factual predicate in support of the rejection. *In re Rouffet*, 47 U.S.P.Q.2d 1453, 1455 (Fed. Cir. 1998).

Claims 2-3, 5-7, 11-12, 14-16, 20-21, 23-25 and 29-31 recite combinations of features including the above combinations, and thus are patentable for at least the above reasons as well. Claims 2-3, 5-7, 11-12, 14-16, 20-21, 23-25 and 29-31 recite additional features, which, in combination with the features of the claims upon which they depend, are patentable over Miller in view of Phaal.

For example, Miller and Phaal, taken singly or in combination, do not teach or suggest "selecting said scheduled time; and notifying said client to resend said network request at said scheduled time" as recited in claim 2 and similarly in claims 11, 20, 28-30. The Examiner cites column 6, lines 28-30 and column 12, lines 24-29 of Miller as teaching the above-cited claim limitation. Paper No. 11, page 3. Applicants respectfully traverse and assert that Miller instead teaches that the content sources 12, 14 will set a desired delivery time depending on the frequency at which an update is needed. Column 6, lines 26-28. Miller further teaches that the central processor 30 at each content source 12, 14 is preferably configured to transmit a request signal at a time prior to the desired delivery time, thereby giving the scheduler 10 enough time to receive the request signal, make appropriate determinations, and notify the content source 12, 14 as to whether the request can be accommodated. Column 6, lines 28-34. Miller further teaches that the request signal typically includes data relating to the time the request was made, the desired time at which delivery is to be completed, the size of the content data, in bytes, to be transferred to the replicated servers 16, 18, 20, and the priority level assigned to the content source 12, 14. Column 6, lines 35-40. Miller further teaches that after notifying the content sources 12, 14 that their requests cannot be accommodated, or can only be partially accommodated, the scheduler may further indicate that such content sources 12, 14 should request a new delivery time. However, requesting content sources 12, 14 to request a new delivery time is not the same as notifying the content source 12, 14 to

resend their request at a scheduled time. Therefore, the Examiner has not presented a *prima facie* case of obviousness since the Examiner is relying upon an incorrect, factual predicate in support of the rejection. *In re Rouffet*, 47 U.S.P.Q.2d 1453, 1455 (Fed. Cir. 1998).

Applicants further assert that Miller and Phaal, taken singly or in combination, do not teach or suggest "wherein said step of selecting said scheduled time comprises the step of selecting said scheduled time from a preselected plurality of time slots" as recited in claim 3 and similarly in claims 12 and 21. The Examiner cites column 6, lines 15-18 of Miller as teaching the above-cited claim limitation. Paper No. 11, page 3. Applicants respectfully traverse and assert that Miller instead teaches that the delivery time is typically set by the content sources 12, 14 and could represent the time when the replicated servers 16, 18, 20 require data updates. There is no language in the cited passage of time selects or selecting a scheduled time from a plurality of time slots. Instead, Miller teaches that the content source set the desired delivery time. Miller does not teach that the content source selects the desired delivery time from a plurality of time slots. Therefore, the Examiner has not presented a *prima facie* case of obviousness since the Examiner is relying upon an incorrect, factual predicate in support of the rejection. *In re Rouffet*, 47 U.S.P.Q.2d 1453, 1455 (Fed. Cir. 1998).

Applicants further assert that Miller and Phaal, taken singly or in combination, do not teach or suggest "servicing said request in real time when resource capacity is available" as recited in claim 5 and similarly in claims 14 and 23. The Examiner cites column 5, lines 57-58; column 6, lines 52-26 and column 13, lines 27-30 of Miller as teaching the above-cited claim limitation. Paper No. 11, page 4. Applicants respectfully traverse and assert that Miller instead teaches that the main memory of the scheduler, scheduler 10, contains data relating to the "pathway" bandwidth available for the network, the percentage bandwidth to be made available for content data transfer according to the time of day, the emergency coverage bandwidth to be made available for content data transfer according to the time of day, and the availability of multicast addresses. There is no language in the cited passages of servicing a request in real time. Neither is there any language in the cited passages of

servicing a request in real time when resource capacity is available. Instead, Miller teaches scheduling data transmissions. Therefore, the Examiner has not presented a *prima facie* case of obviousness since the Examiner is relying upon an incorrect, factual predicate in support of the rejection. *In re Rouffet*, 47 U.S.P.Q.2d 1453, 1455 (Fed. Cir. 1998).

Applicants further assert that Miller and Phaal, taken singly or in combination, do not teach or suggest "wherein each time slot includes a first portion having a first preselected proportion of a predetermined network resource capacity, said first portion comprising a portion reserved for servicing requests in real time" as recited in claim 6 and similarly in claims 15 and 24. The Examiner cites column 5, lines 57-58; column 6, lines 52-26 and column 13, lines 27-30 of Miller as teaching the above-cited claim limitation. Paper No. 11, page 4. Applicants respectfully traverse. For at least the reasons stated above, Miller does not teach selecting a scheduled time from a plurality of time slots. Hence, Miller does not teach that each time slot includes a portion having a preselected proportion of a predetermined network resource capacity. Furthermore, for at least the reasons stated above, Miller does not teach servicing requests in real time. Hence, Miller does not teach a time slot that comprises a portion reserved for servicing requests in real time. Therefore, the Examiner has not presented a *prima facie* case of obviousness since the Examiner is relying upon an incorrect, factual predicate in support of the rejection. *In re Rouffet*, 47 U.S.P.Q.2d 1453, 1455 (Fed. Cir. 1998).

Applicants further assert that Miller and Phaal, taken singly or in combination, do not teach or suggest "wherein each time slot includes a first portion having a first preselected proportion of a predetermined network resource capacity, said first portion comprising a portion reserved for servicing at least one scheduled request" as recited in claim 7 and similarly in claims 16 and 25. The Examiner cites column 7, lines 15-16 and column 8, lines 50-52 of Miller as teaching the above-cited claim limitation. Paper No. 11, page 4. Applicants respectfully traverse. For at least the reasons stated above, Miller does not teach selecting a scheduled time from a plurality of time slots. Hence, Miller does not teach that each time slot includes a portion having a preselected proportion of a predetermined network resource capacity.

Furthermore, Miller instead teaches that the scheduler, scheduler 10, determines for each content source a proportional bandwidth factor. Miller further teaches that this factor relates to the ratio of the size of data to be transmitted by each content source to the total amount of data to be transmitted. However, this is not the same as a portion of a time slot reserved for servicing a scheduled request. Instead, Miller teaches that the scheduler determines an appropriate bandwidth for the amount of data to be transmitted by the content source. Therefore, the Examiner has not presented a *prima facie* case of obviousness since the Examiner is relying upon an incorrect, factual predicate in support of the rejection. *In re Rouffet*, 47 U.S.P.Q.2d 1453, 1455 (Fed. Cir. 1998).

As a result of the foregoing, Applicants respectfully assert that there are numerous claim limitations not taught or suggested in the cited prior art, and thus the Examiner has not presented a *prima facie* case of obviousness for rejecting claims 2-9, 11-18, 20-27 and 29-33 as being unpatentable over Miller in view of Phaal. M.P.E.P. §2143.

B. The Examiner has not presented any objective evidence for combining Miller with Phaal.

A *prima facie* showing of obviousness requires the Examiner to establish, *inter alia*, that the prior art references teach or suggest, either alone or in combination, all of the limitations of the claimed invention, and the Examiner must provide a motivation or suggestion to combine or modify the prior art reference to make the claimed inventions. M.P.E.P. §2142. The showings must be clear and particular and supported by objective evidence. *In re Lee*, 277 F.3d 1338, 1343, 61 U.S.P.Q.2d 1430, 1433-34 (Fed. Cir. 2002); *In re Kotzab*, 217 F.3d 1365, 1370, 55 U.S.P.Q.2d 1313, 1317 (Fed. Cir. 2000); *In re Dembiczak*, 50 U.S.P.Q.2d. 1614, 1617 (Fed. Cir. 1999). Broad conclusory statements regarding the teaching of multiple references, standing alone, are not evidence. *Id.*

The Examiner's motivation for modifying Miller with Phaal to (1) allocate a scheduled time for resending a network request by a client initiating the request, as recited in claim 8 and similarly in claims 4, 9, 13, 17, 18, 22, 26, 27, 32 and 33; and

to (2) select the scheduled time from a preselected plurality of time slots where each time slot includes a portion having a proportion of a preselected network resource capacity and where the portion includes a portion reserved for servicing requests in real time as well as a portion reserved for servicing requests having a priority, as recited in claim 8 and similarly in claims 9, 17, 18, 26, 27 and 33, is to "insure[s] that network performance is increased." Paper No. 11, page 5. This motivation is insufficient for a *prima facie* case of obviousness since it is merely the Examiner's subjective opinion without any support from objective evidence.

Miller teaches transmitting data from a content source over a network to a replicated server is scheduled and performed according to a schedule. Abstract.

Phaal, on the other hand, teaches admission control having enhanced quality of service. Abstract.

The motivation provided by the Examiner (increase network performance) is not a motivation as to why one of ordinary skill in the art with the primary reference (Miller) in front of him would have been motivated to modify the teachings of the primary reference (Miller) with the teachings of the secondary reference (Phaal). The primary reference (Miller) teaches transmitting data from a content source over a network to a replicated server is scheduled and performed according to a schedule. The Examiner must provide objective evidence as to why one of ordinary skill in the art with the primary reference (Miller) in front of him, which teaches transmitting data from a content source over a network to a replicated server is scheduled and performed according to a schedule, would be modified with a secondary reference (Phaal), which teaches admission control having enhanced quality of service. *See In re Lee*, 61 U.S.P.Q.2d 1430, 1433-1434 (Fed. Cir. 2002); *In re Kotzab*, 55 U.S.P.Q.2d 1313, 1318 (Fed. Cir. 2000). Merely stating "to improve network performance" does not address as to why one of ordinary skill in the art with the primary reference (Miller) in front of him would specifically modify the primary reference (Miller) with the secondary reference (Phaal). Any number of references may teach improving

network performance.¹ Consequently, the Examiner's motivation is insufficient to support a *prima facie* case of obviousness for rejecting claims 2-9, 11-18, 20-27 and 29-33. *In re Lee*, 61 U.S.P.Q.2d 1430, 1434 (Fed. Cir. 2002).

Further, the Examiner must submit objective evidence and not rely on his own subjective opinion in support of combining a reference (Miller) which teaches transmitting data from a content source over a network to a replicated server is scheduled and performed according to a schedule with a reference (Phaal) which teaches admission control having enhanced quality of service. *Id.* There is no suggestion in Miller of enhancing quality of service. Since the Examiner has not submitted objective evidence for modifying Miller with Phaaol, the Examiner has not presented a *prima facie* case of obviousness for rejecting claims 2-9, 11-18, 20-27 and 29-33. *Id.*

Further, the Examiner must submit objective evidence and not rely on his own subjective opinion in support of modifying Miller to allocate a scheduled time for resending a network request by a client initiating the request. *Id.* There is no suggestion in Miller of resending a network request. Neither is there any suggestion in Miller of allocating a scheduled time for resending a network request. Neither is there any suggestion in Miller of allocating a scheduled time for resending a network request by a client initiating the request. Since the Examiner has not submitted objective evidence for modifying Miller to allocate a scheduled time for resending a network request by a client initiating the request, the Examiner has not presented a *prima facie* case of obviousness for rejecting claims 4, 8, 9, 13, 17, 18, 22, 26, 27, 32 and 33. *Id.*

Further, the Examiner must submit objective evidence and not rely on his own subjective opinion in support of modifying Miller to select the scheduled time from a preselected plurality of time slots where each time slot includes a portion having a proportion of a preselected network resource capacity and where the portion includes a portion reserved for servicing requests in real time as well as a portion reserved for

¹ Applicants are assuming *arguendo* that Phaal improves network performance.

servicing requests having a priority. *Id.* There is no suggestion in Miller of having time slots. Neither is there any suggestion in Miller of selecting a scheduled time from a time slot. Neither is there any suggestion in Miller of selecting a scheduled time from a time slot where the time slot includes a portion having a proportion of a preselected network resource capacity. Neither is there any suggestion in Miller of selecting a scheduled time from a time slot where the time slot includes a portion reserved for servicing requests in real time. Neither is there any suggestion in Miller of selecting a scheduled time from a time slot where the time slot includes a portion reserved for servicing requests having a priority. Since the Examiner has not submitted objective evidence for modifying Miller to select the scheduled time from a preselected plurality of time slots where each time slot includes a portion having a proportion of a preselected network resource capacity and where the portion includes a portion reserved for servicing requests in real time as well as a portion reserved for servicing requests having a priority, the Examiner has not presented a *prima facie* case of obviousness for rejecting claims 8, 9, 17, 18, 26, 27 and 33. *Id.*

As a result of the foregoing, Applicants respectfully assert that the Examiner has not presented a *prima facie* case of obviousness for rejecting claims 2-9, 11-18, 20-27 and 29-33. M.P.E.P. §2143.

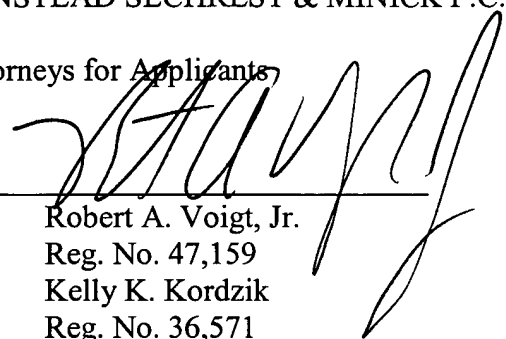
II. CONCLUSION

As a result of the foregoing, it is asserted by Applicants that claims 2-9, 11-18, 20-27 and 29-33 in the Application are in condition for allowance, and Applicants respectfully request an allowance of such claims. Applicants respectfully request that the Examiner call Applicants' attorney at the below listed number if the Examiner believes that such a discussion would be helpful in resolving any remaining issues.

Respectfully submitted,

WINSTEAD SECHREST & MINICK P.C.

Attorneys for Applicants

By: 
Robert A. Voigt, Jr.
Reg. No. 47,159
Kelly K. Kordzik
Reg. No. 36,571

P.O. Box 50784
Dallas, Texas 75201
(512) 370-2832

AUSTIN_1\246316\1
7047-P269X1